

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL
MINUTE ORDER

Date: 03/11/2010

Time: 10:00:00 AM

Dept: C-71

Judicial Officer Presiding: Judge Ronald S. Prager
Clerk: Lee Ryan

Bailiff/Court Attendant: L. Wilks

ERM:

Reporter: Peter C. Stewart

Case Init. Date: 08/12/1998

Case No: JCCP4042

Case Title: JCCP4042 COORDINATION PROCEEDING
TOBACCO LITIGATION

Case Category: Civil - Unlimited

Case Type: PI/PD/WD - Other

Event Type: Motion Hearing (Civil)

Causal Document & Date Filed:

Appearances:

See attached sign-in sheets for appearances.

After taking the matter under submission, the Court rules on the motion to set aside its summary judgment ruling regarding "light" cigarettes as follows:

On September 30, 2004, the Court ruled on Defendants' four motions for summary judgment. Among the several rulings, the Court granted summary judgment for Defendants on Plaintiffs' claim challenging Defendants' use of "lights" descriptors in advertising cigarettes, finding 15 U.S.C. §§ 1331 et seq., the Federal Cigarette Labeling and Advertising Act (FCLAA), preempted Plaintiffs' claims. (See this Court's prior ruling (Prior Ruling), discussing MSJ No. 2, Issue No. 2.) Relying on *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 524-528 (*Cipollone*), this Court found that Plaintiffs' claims involved failure-to-warn or warning neutralization claims, rather than an affirmative misrepresentation, and therefore such claims were preempted. Since the Court's ruling on Defendants' motion for summary judgment, numerous other trial and appellate courts have considered the question of whether tobacco companies' use of the descriptor "light" in describing cigarettes they claim have reduced tar and nicotine levels is preempted by FCLAA. The subsequent cases create a dispute and the parties agree the Court should exercise its discretion to revisit the issue in light of, specifically, *Altria Group, Inc. v. Good* (2008) ___ U.S. ___, [129 S.Ct. 538, 172 L.Ed.2d 398] (*Altria*) (subsequent references to *Altria* include page numbers found in 129 S.Ct. 538).

Plaintiffs' present and past position in its opposition to the motion is that "Defendants violated the UCL through their false and deceptive statements, advertisements and publications throughout the class period which were likely to mislead reasonable consumers regarding claimed 'Light' and 'Low Tar' cigarettes." (See Plaintiffs' Opposition Separate Statement, at 36.) Further, the use of the term "Lights" in the cigarettes' label is deceptive (i.e., violates the duty not to deceive) because it "misleads as to the extent of the danger" because the public believes Lights are safer or healthier than regular cigarettes." (See Plaintiffs' Opposition at 29:11-12.) This Court previously ruled that simple use of the term "Lights" was not, in and of itself, an express misrepresentation and because Plaintiffs failed to produce evidence that Defendants had ever expressly publicly stated that Light cigarettes are healthier, Plaintiffs failed to remove the possibility of preemption based on their affirmative misrepresentation claim.

Plaintiffs alternatively argued fraud by implication, asserting that the mere use of the term "Light" is

Date: 03/11/2010

MINUTE ORDER

Page: 1

Dept: C-71

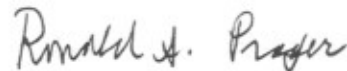
Calendar No.: 4

inherently misleading, as consumers believe products termed "Light" are healthier products. The Court found these arguments to be somewhat speculative and without evidence, and concluded that Plaintiffs' arguments centered on duties pertaining to smoking and health. From that perspective, the Court found that the core of Plaintiffs' claim is that the warnings mandated by Congress are inadequate with respect to Light cigarettes, and determined the claim was preempted by the FCLAA. Having reviewed Altria, the Court now finds Plaintiffs' "Light" claims are not preempted by FCLAA, rendering the Court's September 30, 2004 ruling on this issue no longer viable.

In Altria, as in this case, the consumer plaintiffs claimed that the tobacco companies "fraudulently marketed their cigarettes as being 'light' and containing '[l]owered [t]ar and [n]icotine'" to convey to consumers that they deliver less tar and nicotine and are therefore less harmful than regular cigarettes." (Altria at 541.) The tobacco companies in Altria contended "that [the plaintiffs'] claim is like the pre-empted warning neutralization claim because it is based on statements that 'might create a false impression' rather than statements that are 'inherently false.'" (Altria at 546.) On this point, the Supreme Court reasoned that, "the extent of the falsehood alleged does not alter the nature of the claim. Nothing in the Labeling Act's text or purpose or in the plurality opinion in Cipollone suggests that whether a claim is pre-empted turns in any way on the distinction between misleading and inherently false statements." (Altria at 546.) Important here is the Supreme Court's conclusion that, "it is clear that our holding in Cipollone that the common-law fraud claim was not pre-empted is directly applicable to the statutory claim at issue in this case. As was true of the claim in Cipollone, [plaintiffs'] claim that the deceptive statements 'light' and 'lowered tar and nicotine' induced them to purchase petitioners' product alleges a breach of the duty not to deceive. To be sure, the presence of the federally mandated warnings may bear on the materiality of [the tobacco defendants'] allegedly fraudulent statements, 'but that possibility does not change [plaintiffs'] case from one about the statements into one about the warnings.' [Citation omitted.]" (Altria at 546.)

Altria expands the breadth of claims that can be pursued in state courts against tobacco companies, permitting fraud by implication claims to stand based on a finding that such claims are rooted in the UCL's duty not to deceive, which "has nothing to do with smoking and health." (Altria at 545.) It has become evident that the ruling on Defendants' motion for summary judgment, as it pertains to the "Lights" claim, is based on an overly narrow interpretation of fraud. Notably, the Maine federal district court in Altria, which was reversed by the First Circuit Court of Appeal and by the United States Supreme Court, expressly relied on this Court's reasoning in the instant case. Accordingly, the Court denies Defendants' second motion for summary judgment as to the Issue No. 2 based on Altria.

IT IS SO ORDERED.



Ronald S. Prager

**Superior Court of California
County of San Diego**

SIGN-IN SHEET

F Calendar No.: **4** D

Clerk of the Superior Court
Court Use Only

MAR 11 2010

By: LEE RYAN, Deputy


CASE: JCCP4042 - JCCP4042 COORDINATION PROCEEDING TOBACCO LITIGATION


EVENT TYPE: Motion Hearing (Civil)

EVENT DATE/TIME: 03/11/2010 10:00 am



DEPARTMENT: C-71

JUDGE: Ronald S. Prager


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